IN THE SUPREME COURT OF THE UNITED STATES

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DORA B. SCHRIRO, DIRECTOR, :
ARIZONA DEPARTMENT OF :
CORRECTIONS, :
Petitioner :
v. : No. 03-526
WARREN WESLEY SUMMERLIN. :

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Washington, D.C.
Monday, April 19, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

JOHN P. TODD, ESQ., Assistant Attorney General, Phoenix, Arizona; on behalf of the Petitioner.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

KEN MURRAY, ESQ., Assistant Federal Public Defender, Phoenix, Arizona; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-526, Dora B. Schriro v. Warren Wesley Summerlin.

Mr. Todd.

ORAL ARGUMENT OF JOHN P. TODD

ON BEHALF OF THE PETITIONER

MR. TODD: Mr. Chief Justice, and may it please the Court:

The rule this Court announced in Ring did not change what is to be decided. It only changed who decides. It did not make any conduct -- it did not decriminalize any conduct, nor did it make any defendant ineligible for the death penalty.

We agree with all the State and Federal appellate courts that have looked to determine whether Apprendi or Ring should apply retroactively and concluded that the Apprendi/Ring rule is not the sort of ground-breaking rule that overcomes this Court's Teague bar.

QUESTION: Mr. Todd, could we go back to what you opened with, that you said this is just a -- and you emphasized this throughout your brief -- it's only a who decides, not what. But I thought that the notion in Ring is that it adds elements to the offense that were not

there before. So now you have aggravating factors is an element of the offense, and by so characterizing it, other things happen. It has to be proved beyond a reasonable doubt on the aggravating or the other aggravating factors. You would have whatever you have to prove elements; that is, you -- the confrontation clause would apply, everything that goes with making it as part of the substantive crime. Is that not so?

It's not just a question of, well, before it was the judge and now it's the jury. Because it's part of the substantive crime, other things go along with it too, don't -- don't they?

MR. TODD: Justice Ginsburg, my understanding of this Court's holding in Ring was that it applied the Sixth Amendment jury guarantee as -- as this Court recalls, Arizona already found, beyond a reasonable doubt, this -- these particular aggravators and that it applied it to -- for purposes of finding these -- these aggravators. It -- it didn't change the substantive reach of the statute. Those --

QUESTION: Well, let me give you a concrete example. The judge relied on the presentence report in -- in this case. If the -- if it had to be found by the jury, if the aggravating factor had to be found by a jury beyond a reasonable doubt, would that presentence report

have been admissible?

MR. TODD: Well, Your Honor, the judge in this particular case did not rely on a presentence report to find either of the aggravating circumstances that he found. He relied on the trial testimony to find the -- that the crime was --

QUESTION: Well, just let's say that the judge could consider, or would you concede that if the judge could make this determination, that the judge could, and judges routinely do, look at presentence reports?

MR. TODD: Not under Arizona law, Your Honor, that the -- the aggravating circumstances that are -- that are present in Arizona law are not the type that would be -- you could rely on a presentence report to find because Arizona law doesn't permit hearsay evidence to establish the aggravator.

But the -- the key question -- I mean, the key fact is that the underlying conduct, the -- has not changed at all, that the aggravators are the same today as they were before Ring. The -- it has the conduct -- the reach of the statute hasn't changed. All we're talking about is applying the Sixth Amendment guarantee to these aggravators that the Arizona put into their sentencing statute as a result from this Court's opinion in Furman.

QUESTION: Was it clear under prior law that the

aggravators had to be found by the judge beyond a reasonable doubt?

MR. TODD: That's correct, Your Honor. Yes, Justice Kennedy.

QUESTION: Was that in the statute or the supreme court decision?

MR. TODD: Supreme court decision.

QUESTION: Thank you.

QUESTION: It's sort of like a mixed case on the substantive procedural part. It's -- the argument that it's substantive, which is -- imagine you have a statute that says if you use a gun in connection with a drug sale, it's a crime. All right? And then this Court says that doesn't mean the drug in the -- the gun is in the attic. you know, the gun is in the attic -- that doesn't count. That's clearly substantive, isn't it?

MR. TODD: Yes, Justice Breyer.

QUESTION: All right. Now, suppose they have a subpart (b) which said if the gun is in the attic, you get more, but the gun in the attic will be found by the judge. That's just as if those words, gun in the attic, weren't there. So it's just like the first statute, and that's Apprendi, you see. That's Apprendi.

And you say, well, if you got that second statute that looked just like the first, this one does

too. I mean, that's the argument. And you say, well, which way should we look at it. I'm not sure.

MR. TODD: Well, Your Honor, I -- I think that the -- that this Court's discussion in Bousley or Bousley -- as -- as you were indicating based on the Bailey decision, sort of capsulizes where -- what -- what in terms of retroactivity analysis, where substantive -- what -- what a real substantive change is.

QUESTION: We -- didn't we make it quite clear in Bousley that it was important that we were interpreting a Federal law, which we had the authority to interpret, rather than what's happened in this case where, as I understand it, the Supreme Court of Arizona has said the change brought by Ring was procedural.

MR. TODD: That's -- that's correct, Mr. Chief Justice.

The -- this Court does not construe State statutes. State courts do that, and it's our position that in order to change the substance of a crime, this is something either that the legislative body must do or that the State court, in the case of a State --

QUESTION: Does it follow, if it is procedural, that you necessarily prevail? If -- you -- you do agree that he has been sentenced to death by an unconstitutional procedure.

MR. TODD: This Court has said that it was, yes.

QUESTION: Yes, I mean, under our holdings.

And do you know any case in which we've held that a death sentence can be carried out when it was imposed pursuant to an unconstitutional procedure?

MR. TODD: I -- if I read your cases correct, Justice Stevens, I believe that you have decided three cases since Teague in which you have found that the -- there was a problem, unconstitutional problem, with a jury sentencing procedure in a capital case and you have found that those cases are Teague barred.

QUESTION: But the -- the -- what was barred was considering whether or not there was a constitutional violation. We didn't actually hold that where it was acknowledged there was a constitutional violation, that the death sentence could be carried out. Or am I wrong on that?

MR. TODD: My recollection, Justice Stevens, is that in each of those cases there had been a prior holding by this Court finding some unconstitutional procedure and that the case was in these three cases that procedure existed, only they had -- they were on collateral review and this Court found them Teague barred.

QUESTION: I see.

MR. TODD: In our opinion, the only way that Mr.

Summerlin can avoid this Court's Teague bar is if somehow he can find that the Apprendi/Ring rule fits within the exception for watershed changes in the rule. And as this Court recalls, in order to do that, the Ring/Apprendi rule must meet two tests. It must satisfy two tests. The first test is it must enhance the accuracy. The second test is it must alter this Court's understanding of some bedrock principle.

Now, as to the -- the first test, we would suggest that this Court's line of cases from 1968 answer the first question in the negative. That is, that the Sixth Amendment jury guarantee and cases arising out of that are not to be applied retroactively. As you -- as you recall in Duncan v. Louisiana in 1968, this Court for the first time held that the Sixth Amendment jury guarantee should be applied to the States. And in that very case -- in that very case, this Court said that judge trials are not inherently unfair. Then a month later in DeStefano v. Woods, this Court decided and held that this right, this very right to have a jury trial, would not be applied retroactively. And then in a series of cases after that, this Court -- that in cases where the -- the right arose out of the jury guarantee -- this case -- the Court did not apply those cases retroactively. At the time when the military was -- had a right to a jury for a

civil offense that the person committed, this Court held that that would not be applied retroactively.

QUESTION: May I interrupt you just once more? Because I'm most interested in the capital cases. Am I correct in remembering that after Furman, all of the death sentences across the country were held invalid retroactively?

MR. TODD: Well, Your Honor, the -- I can't speak to -- to all the cases. In Arizona what -- what happened was that the -- after Furman, that sentencing, the jury verdict in all the death penalties were unconstitutional. And the -- the Arizona Supreme Court simply applied Arizona law and said the sentence was excessive and, therefore -- because it was unconstitutional, and therefore, imposed life sentence. I don't -- I was unable to find any case that really briefed or discussed the whole question of retroactivity or whether you could --

QUESTION: Well, you wouldn't -- you wouldn't contest that Furman was a watershed decision, would you?

MR. TODD: No, I would not.

QUESTION: So, I mean, the question is whether this -- whether Ring is equivalent to Furman as far as watershed decisions go I guess.

MR. TODD: Of course, Justice Scalia, our

position is that it is not. It's far from it.

But the -- all these cases that the cross section -- right to have a cross section of the community represented on a jury -- that was not applied retroactively.

QUESTION: Let me just ask you why is Furman a watershed decision? It just said the procedures were all wrong. What -- what made that watershed and -- and this not watershed?

MR. TODD: Because Furman affected all death penalty cases nationwide.

QUESTION: Because it was applied retroactively.

MR. TODD: And -- and it --

(Laughter.)

MR. TODD: It -- and it was a complete --

QUESTION: And I suppose if this case is applied retroactive, this might be a watershed decision.

(Laughter.)

QUESTION: Was Furman decided before Teague?

MR. TODD: Furman, Justice O'Connor, was decided before Teague. And -- and also in Furman, there was a major shift in this Court's thinking and understanding of the meaning of the Eighth Amendment.

QUESTION: Yes, which -- an understanding which -- which had existed in the country for a couple of

hundred years, whereas, as I understand Ring, it's based on a reversal of -- of a relatively recent practice of announcing in statutes sentencing factors as opposed to elements of the crime. That -- that was a quite recent practice and it seems to me quite reasonable to think that Furman was a watershed and that -- that Ring and -- and Apprendi, which preceded Ring, was not. It was just a correction of a temporary wandering off from the -- from the common law rule.

MR. TODD: We would agree, Justice Scalia.

QUESTION: You would agree that Apprendi just corrected a -- a minor wandering law, not an old rule?

QUESTION: There's a question whether it corrected anything.

MR. TODD: At -- at most -- at most, Apprendi merely extended in an incremental degree an existing proposition of this Court.

QUESTION: Apprendi purported, did it not, to be setting forth established law? Did it not?

MR. TODD: I --

QUESTION: And -- right?

MR. TODD: Yes.

QUESTION: And did Furman?

MR. TODD: No. It was a -- a complete change is my understanding.

QUESTION: There was no -- there was no Court opinion in Furman, was there?

MR. TODD: No, there was no opinion by the full Court where every -- all the members agreed or a majority of the members agreed.

QUESTION: What will you do if -- I mean, I absolutely accept your point, at least for argument, that -- that if you go through the factors that favor calling it a watershed rule, you've listed several that argue strongly against calling it a watershed rule.

And I want your reaction to something on the other side. And I have to say, though, I'm sure he -- he will agree with these words. Justice Scalia will not agree with the sentiment I'm quoting him for. But in Ring he said -- he spoke about the repeated spectacle of a man's going to his death because a judge found an aggravating factor existed and added that we cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Now, what I'm using those words to call to mind is that here we will have the spectacle of a person going to his death when he was tried in violation of a rule that the majority of the Court found to be a serious procedural

flaw. See, I'm not calling it absolutely overwhelming. So I'm giving you that, but on the other side, I'm trying to focus your attention on the spectacle of the man going to his death, having been sentenced in violation of that principle. What do you want to say about that?

MR. TODD: Your Honor, in our view Teague answers that question, that if the Apprendi/Ring rule would come within the Teague exception, then certainly in fairness, it should be applied retroactively.

QUESTION: Justice Breyer is -- is arguing for a -- a general capital sentencing exception to Teague. I mean, you -- you could make that statement that he just made in any capital case.

QUESTION: No, but -- but anyway --

(Laughter.)

QUESTION: -- the -- the -- Teague, of course, encapsulates a long prior history with Justice Harlan trying to formalize to a degree rules that will separate the more important for the less important. Is that fair?

MR. TODD: Yes, absolutely, Your Honor. And our position is that this case, because of -- it doesn't increase the accuracy, the -- the Teague/Apprendi rule, and it does not -- is not even a bedrock rule, not even a bedrock rule, let alone a -- a change in this Court's understanding of a bedrock rule.

QUESTION: Of course, is Teague itself a bedrock rule? It was judge-made rule, isn't it? It's not in the Constitution itself or any statute anywhere. It's a judge-made rule.

MR. TODD: Teague --

QUESTION: And that should trump the constitutional right at stake.

MR. TODD: Teague is a judge -- judge-made rule, Your Honor, yes.

If I may reserve the remainder of my time.

QUESTION: Very well, Mr. Todd.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

With respect to the bedrock principles -- that is -- that is, the bedrock watershed rules that come within the second Teague exception -- the Court has articulated that exception not in terms of any rule that carries out a principle of the Constitution, even an important rule that carries out a principle of the Constitution, or one of the amendments that have been incorporated, but rather a bedrock rule.

And the examples that the Court has given, which are things like the violation of the rule of Gideon against Wainwright or a mob dominating a trial or the knowing use of testimony that was -- of a -- of a confession that was extracted by torture I think give guidance as to what that sort of bedrock rule is. And what it is, is those are elements that, if they exist in a criminal trial, you can look at that trial and say this was not -- could not have been a fair trial. In fact, the trial conceivably could have come to the right result, but it couldn't have been a fair trial if those elements were not satisfied.

The rule in Ring and Apprendi does not come within that class.

QUESTION: Mr. Feldman, what would you think the result should be for someone whose capital conviction and sentence became final after Apprendi but before Ring?

MR. FELDMAN: I -- I think that -- that was a relatively brief period, but during that period, this Court's decision in Walton had held that judges could decide aggravating factors. And accordingly, the law at that time was that and it would have to satisfy the Teague second exception if it were to be applied. For the reasons I've said, I don't think it does.

The Court --

QUESTION: Let me ask you something else. I don't think you cited or relied on that DeStefano v. Woods case. Why not?

MR. FELDMAN: We should have. The Court said in -- in the -- in the Duncan case -- actually the quote is we would not assert that every criminal trial or any particular trial held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. That's a quote from Duncan.

In DeStefano, which was a pre-Teague case and I suppose maybe that was the reason why it was overlooked, but the Court relied on that particular reasoning in holding that the Duncan rule, which was the whole Sixth Amendment right, should not be retroactively applied.

The rule in Apprendi and Ring doesn't apply to the whole Sixth Amendment right. It was long accepted before Apprendi and Ring that any element that the legislature identifies as an element of the offense has to be proven to the jury. The question in these cases was things that the legislature had -- was at the margins, things that the legislature had set forth not as an element of the offense, but as a sentencing factor that only goes to sentencing. And what those cases did is divide up the -- the universe of things that just go to sentencing and say some of them have to be submitted to

the jury and others don't.

Those kinds of line-drawing decisions are not the kinds of things that are -- that you can look at the commission of that particular fact to a judge rather than a jury and say this proceeding couldn't have been a fair one. In fact, judges make -- the Court has recognized that judges make similar types of decisions both procedurally in terms of the admission of evidence, in terms of the application of the Fourth Amendment, and even substantively, in fact, even in the capital context, in deciding the presence of mitigating factors, in deciding facts that may be of -- of crucial importance in weighing the weight of mitigating against aggravating factors. All of those things judges may permissibly do and may do so fairly.

Given that those things can be decided by a judge fairly, I don't think that it can be said that the rule in Apprendi and in Ring reaches that level of bedrock importance, that it just is -- is -- necessarily the whole proceeding was unfair because this element was --

QUESTION: Can we go back to the -- the first and how you characterize this? I would imagine you list elements of an offense. Well, the elements of an offense -- that has a substantive feel. Who decides has a procedural feel. It seems to me you could give this a

substantive characterization if you're saying recite the elements of -- of an offense. That sounds very substantive. What does it take to -- to compose this crime. And then -- well, and then you say it -- well, it's just who decides. That's a procedural question. You can characterize this fairly either way I think.

MR. FELDMAN: I -- I don't think so. I think for the -- for purposes of Teague, the best definition of substantive offense -- of what is substantive is what substantive is what -- what has been made criminal and -- and perhaps what facts -- on what facts turns a particular punishment. The definition of those facts is a substantive point. And the reason for that is that in Bousley, what the Court said was a -- a longstanding concern of Federal habeas is that someone is going to stand convicted of an offense based on conduct that the law does not make criminal or does not subject to the punishment that he's going to get.

Now, when a court comes to a new understanding of an element of -- of what the meaning, the substantive meaning, of an element of an offense, what conduct is or isn't criminal or can or cannot be subject to a particular punishment, there is a risk that -- that the defendant, who was tried under a different standard, does stand convicted of committing an act that the law didn't make

criminal. And that's why substantive rules don't come within Teague.

But where -- what happened here is not at all times, both before and after Ring, the -- in Arizona the list of aggravating circumstances was the same. They meant exactly the same thing. And that risk that the Court talked about in Bousley of standing convicted of an act based on a finding that you committed an act that in fact is not criminal or couldn't be subject to the death penalty, that risk was not raised by this decision in Ring.

QUESTION: Mr. Feldman, do you think that the outcome of this case necessarily determines whether Apprendi is retroactive or not?

MR. FELDMAN: I -- I would think they stand or fall together because the Court in Ring --

QUESTION: Do you think if we hold this is bad, we must follow the same rule in Apprendi?

MR. FELDMAN: Well, I'd prefer not to be categorical about that. I -- I mean, if the Court reached that conclusion, I'd want to see what the reasoning was that the Court used and see whether there are distinctions or aren't distinctions at that point.

But the Court --

QUESTION: But if we -- if we said, for example,

that this is -- this is retroactive because we, in effect, have said that the sentencing factor is -- is like an element so that we are, in fact, for purposes of -- of serving the jury right, recharacterizing or redefining the -- the crime, then that would cover Apprendi as well as this case, wouldn't it?

MR. FELDMAN: It -- it may well. It may well.

But I don't think the Court should reach that result for the reasons I just said, which is as a matter of substance and procedure, I think you can -- if the question is, is this an element or is it a sentencing factor, but in both cases it's something that the legislature intended to set aside as this is something that's going to trigger a particular penalty, in this case the eligibility for the death penalty, either way I don't think that's a substantive decision.

If the question is, as it was in Bousley or in the -- the Bailey case, well, is mere possession of a gun a criminal act or do you have -- or is something else, is it something narrower than that, it has to be active use of the gun, that is a substantive decision because there are defendants who might have been found to have just possessed the gun and -- and therefore not to be guilty of any crime at all. And that does tie into a core purpose of habeas as -- as the Court articulated in the Bousley

case.

The Court has said in -- said in Tyler -- to return to the -- the bedrock, the second Teague exception, the Court said in Tyler and -- v. Cain, that not all rules relating to due process, not even all new rules relating to the fundamental requirements of due process, will satisfy the second Teague exception. That exception is a narrow one because States have very vital interests in the finality of criminal convictions and in coming to closure after there's been a criminal conviction based on a good faith interpretation and reasonable interpretation of existing law, that not having to constantly reopen criminal convictions as the law naturally develops, as it does with respect to the jury trial right or any of the other rights that have been incorporated.

Applying that standard, the -- the decision in Ring and the decision in -- in Apprendi also, shouldn't be applied -- don't come within the Teague second exception because it cannot be said in those circumstances that the -- that the trial, in violation of those rules, was necessarily -- couldn't have been a fair trial.

If there are no questions from the Court --

QUESTION: Thank you, Mr. Feldman.

Mr. Murray, we'll hear from you.

ORAL ARGUMENT OF KEN MURRAY

ON BEHALF OF THE RESPONDENT

MR. MURRAY: Mr. Chief Justice, and may it please the Court:

I'd like to first go right to the heart of the issue of the questions that were between Justice Breyer and Justice Scalia and point out that we are not, in fact, asking for an exception in death penalty cases of Teague, but we are asking the Court to look at the specific issues involved in capital cases and how the Teague exception that -- that implicates accuracy and fairness is applied in those contexts.

And this Court has done that before in Stringer v. Black, the only case that we are aware of where you were looking at jury instructions to whèther they're old and new. The -- the criteria and the specific unique aspects of the death penalty and the aggravating circumstances that you were looking at, such as the heinous, cruel, and depraved one that's in this case, were of a particular importance in determining whether the issue was new or old.

QUESTION: Did the court of appeals rely on the fact that there was a -- this was a death case as part of its reasoning?

MR. MURRAY: It did in many respects, Your Honor.

QUESTION: You mean it said in so many words?

MR. MURRAY: Well, it -- it pointed out the fact of the necessity of having evidence presented in a manner that would go to accuracy in a capital case, especially one was -- you know, if somebody was looking at the death penalty, and there was a concurrence that specifically went into the fact that this was a capital case.

It's important to note if -- if we're going to the first in the Teague exception that implicates accuracy and -- and fairness, it's important to note that at the heart of the Sixth Amendment, we have the right to have all the facts necessary for a sentencing decision to be made by a jury. And it's even more essential in capital cases. In death penalty cases, juries really do make a difference.

QUESTION: Well, isn't -- isn't that because a lot of the sentencing -- a lot of the aggravating factors the sentencing pivots are -- are not only factual but normative? I mean, heinous, atrocious, and cruel is -- is the -- is a perfect example of it. It's -- it's a how -- how bad is it kind of determination.

This isn't so much a matter of accuracy as it is a -- a matter of -- of moral weighing, and does that fall within prong one of -- of the Teague exception?

MR. MURRAY: Prong one of the second exception?

QUESTION: Yes.

MR. MURRAY: Yes, Your Honor, to the extent that -- I mean, I understand what you're saying, but to the extent that this is going to categorical accuracy.

QUESTION: But it sounds more like judgment than accuracy is what I'm getting at.

MR. MURRAY: It is -- and is -- and that's why the accuracy I -- we believe has to be categorical. If I could put it this way. There's -- there's a imaginary line of -- about who can get closest to being correct in the term of accuracy that really hasn't been defined by the Court in this context, but in everyday uses accuracy is -- is sort of getting it right. But that's not what really works out here in these capital cases because we have this normative or subjective type aggravating circumstances.

We're talking about can we say for sure that jurors versus the judge -- the individual judge would always get these issues the same. And if they would not, if they would not categorically be accurate in that respect, then we have a problem because the -- the jurors are supposed to be representing the community's common sense.

QUESTION: Well, that's -- that's -- everything you say is -- is true so far, but I don't know that that

gets you to satisfy the accuracy prong. Judges and juries may -- I -- I don't know how it would really work out, but they -- they may make different normative judgments, different moral judgments in -- in applying a factor like this. But I don't think it falls within the -- the category of accuracy.

MR. MURRAY: Well -- well, Your Honor, we're -- our position is that it's accuracy only in, as I said, a categorical context because you can't ever determine who is absolutely right or wrong. It's not like adding numbers. But you can say that after the Court's decision in Ballew and other cases looking at group deliberation and unanimity requirements and the proper presentation of evidence to the jury, that their role as the community's voice for what their sense of -- of the moral outrage, of what their sense -- in determining the eligibility, because that's what we're looking at here with the aggravators in Arizona, is going to be more accurate over the long run than a single judge.

QUESTION: Mr. Murray, I -- I have sort of the same problem that Justice O'Connor did. I find it hard to contemplate how we could have held in DeStefano that Duncan v. Louisiana, which for the first time applied the jury trial guarantee of the Federal Constitution to the States -- I mean, the entire trial didn't have to be

before a jury until we decided Duncan. And in DeStefano, we said that decision doesn't have to be retroactive, that the cases decided before Duncan will stand even though the judge decided the entire criminal case, not just the -- the one element we're talking about here.

How -- how can you possibly reconcile that with what you're asking us to do here? This seems relatively minor compared to the quite more massive change in accuracy, if you believe it, which -- which Duncan produced.

MR. MURRAY: Well, specifically, Your Honor, we have two responses to that.

First, there are other cases from this Court's precedent where the DeStefano's refusal to find retroactivity for Duncan was set aside and not followed. For example, after Ballew, then you had Brown and the Burch decisions, and they -- they specifically refused to find -- follow DeStefano, and in fact, this Court said, rejects the argument in Brown v. Louisiana that DeStefano's refusal to apply Duncan retroactively controlled and because of a constitutional rule directed toward ensuring that the proper functioning of the jury in those cases in which it has been provided can be given retroactive effect. That is in note 13 in -- in Brown.

QUESTION: But -- but those cases do not involve

the precise issue that you're bringing before us here. The precise issue in Duncan was the difference between having the judge decide and having the jury decide. That's the very thing that's at issue here. Those other cases you mentioned did not involve that very thing.

MR. MURRAY: Yes, Your Honor. In Duncan, they had dealt with the issue of whether there is a right to jury trial in the States.

We also have other cases from this Court's precedents such as In re Winship, which was going to the burden of proof to prove every element being held retroactive.

We have Mullaney being held retroactive and Hankerson which talks about whether the States can make sort of end runs around by labeling issues as sentencing factors --

QUESTION: The point is that they didn't involve precisely what is involved here. The difference between having the judge decide the case and having the jury decide the case. Our only precedent dealing precisely with that issue says that the decision is not retroactive.

MR. MURRAY: That's correct, Your Honor, but also you can remember that that case was decided pre-Teague when the balancing process that the Court used included a consideration and -- and have given great

weight to the consideration of the overall effect of the administration of justice.

And I'd also point out --

QUESTION: Teague -- but Teague does that too, does it not? Gives great weight to the overall effect in the administration of justice in a different way perhaps.

MR. MURRAY: Teague has done that essentially to the extent that the Court is going to consider that by the definition of a standard that is set in Teague. But it has withdrawn it as a balancing factor that's specifically taken into consideration and can be given as much weight as it has previously.

I'd also point out that Teague as -- as a result of Justice Harlan's writings in Desist and Mackey and he himself had said that the failure to hold Duncan retroactive in DeStefano was -- probably eroded the principle that new rules affecting the very integrity of fact-finding processes are to be retroactively applied. So --

QUESTION: That was a separate opinion, was it not?

MR. MURRAY: It was, Your Honor.

If I can then, I'd like to move on to the substantive and procedural question that has been raised, and that is something that has caused a lot of confusion.

But it is not our position that Ring -- the rule in Ring itself is purely substantive because every substantive ruling will generate and will have flow from it a procedural consequence constitutionally. So Ring is both procedural and substantive. But it had to be substantive first because what the Court said in Ring was these aggravating circumstances in Arizona where they are used for the purpose of determining eligibility as opposed to the purpose of imposition of the death penalty or selection under the Eighth Amendment due -- Eighth Amendment jurisprudence -- these factors are necessary to establish eligibility for the death penalty. Thus, it follows that the conviction for murder or first degree murder which the jury can make in -- under Arizona law, plus the finding of the aggravating factor is what actually makes an individual guilty of a capital offense in Arizona.

QUESTION: I agree. I think you can see it as substantive or you can see it as procedural.

But I wonder, because you've read all these cases now, is that -- is -- do you -- do you think that the Teague categories -- how fixed are they meant to be? What I'm thinking of in particular is the remark that actually the Chief Justice made about it did reflect something to do with administration of justice.

So suppose that you had a case in which it looks as if it falls on the substantive side of the line, but really to let everyone out of prison is going to -- is going to just devastate the justice system. Is there room, given Teague, for some flexibility there? In other words, are the factors absolutely written in stone? Is there any indication they're flexible to read in the light of Teague's purposes? What's your reaction to that?

MR. MURRAY: Well, our position, Your Honor, is that there is room for flexibility and -- and it is essential if you're going -- if the Court is going to be looking at these cases and trying to determine how the result of their decisions will affect everybody else who are in similar positions, because the goal of Teague is to ensure that people in similar circumstances receives equal treatment. And in looking at the specific circumstances, I think that it is flexible.

QUESTION: Mr. Murray, we have many opinions which -- which comment upon the fact that the -- the line between substance and procedure is an extremely variable one and that they really are just -- just two opposites in various fields, and -- and where the line is depends upon the purpose for which you're calling it substantive or calling it procedural.

Now, Mr. Feldman gave us what he -- what his

assessment of -- of what our Teague rule means by -- by substantive and that is if you have changed the -- the punishment or if you have changed the status of whether an act could be performed without being criminally punished, that is a substantive change.

Now, if you believe that that's what substance versus procedure means here, this is clearly not substantive. Right?

MR. MURRAY: If that's the limitation --

QUESTION: If -- if that's what it means.

Now, if -- if you don't agree with his description of -- of what the dichotomy is, what is your understanding of -- of what constitutes something that is substantive under -- under Teague?

MR. MURRAY: Our understanding, Your Honor, is that the position that the Assistant SG gave is included in a broader, more universal definition of what substantive is and that is at the core of a substantive ruling is defining what the elements of an offense are, back to the status quo of finding what is a crime, what is the crime of capital murder --

QUESTION: Even though the additional 5 years or 10 years for -- for an act that was innocent was being imposed under the rubric of a sentencing factor rather than under the rubric of element.

MR. MURRAY: Well, anytime that you -- yes, but anytime that you change the definition, it's a substantive -- substantive change --

QUESTION: Well, it -- it is substantive for the purpose of whether it's in a criminal procedure book as an element or as a -- as a sentencing factor, but it's not substantive for the purpose of whether an individual knew that if he did this, he was going to get 5 more years. It's not substantive in that sense. And I thought that that's what Teague was talking about.

MR. MURRAY: Well, Your Honor, that -- that sounds of the first exception to Teague, and our position is that -- is not the entire universe of what substantive is about because in this case, although in Arizona the individuals were charged with -- setting aside for the moment the indictment issue, they were charged and given notice, at least pretrial, of the aggravating circumstances for which they -- the State was trying to impose the death penalty. So that is known.

But the -- the question is would -- did they know that the -- the jury -- that they have a right to have a jury verdict. Did they know that the jury was not going to be determining essentially what was the offense of capital murder? And that is where it becomes a substantive situation because in Arizona they do not,

based on the jury's finding, convict the individual being charged in a capital case of capital murder. It wasn't until Ring came down, that they finally admitted that in Arizona from -- from the other side, but that's the essence of the substantive.

QUESTION: There was a question that was asked to Mr. Wood and that was about do Apprendi and Ring go together, and I'd like your answer to that. If we agree with you that this is substantive, wouldn't it follow that Apprendi also would be retroactive?

MR. MURRAY: The short answer, Your Honor, is maybe or -- or not necessarily. It would depend on the --

(Laughter.)

MR. MURRAY: -- the reason --`

QUESTION: What -- what -- could you give me a reason why they shouldn't go together?

MR. MURRAY: If -- if you rule -- we've presented basically four arguments. If you accept the argument that there was a misunderstanding of State law, not Federal or that it was an old rule, which we haven't discussed yet, we don't think that Apprendi and Ring would be hooked together.

If it's the substantive versus procedural issue that this Court relies upon, our position -- it would be difficult to distinguish Apprendi from Ring. If -- if

we're going to buy our -- our definition of substantive, then they will both probably be the same.

If we get to the second exception of Teague, the one that implicates the fairness and accuracy, our position is that you wouldn't necessarily have to overturn or make Apprendi retroactive if you're depending on the specific and unique aspects of capital cases that we've been discussing so far.

QUESTION: On your -- your not a new rule, I found that hard to follow in light of Walton. I mean, Walton was the law until Ring said it was -- overruled it pro tonto.

MR. MURRAY: Yes, Your Honor.

QUESTION: So how could it not be -- given that Walton was the instruction, how could Ring be anything but new?

MR. MURRAY: Well, Ring went back, so to speak, to the old law. First off, let me just point out in answering the question that Mr. Summerlin's case was pre-Walton. His case became final 6 years before this Court's decision in Walton.

What happened in Walton then was this Court made the decision, based on the aspect -- the issue of whether there is a Sixth Amendment right to juries' involvement in sentencing in capital cases. Walton, until Ring, was in

essence a -- a blip in the history upon which the State jumped on to deny relief in these cases.

In Ring, the Court recognized that there is a difference between the Sixth Amendment right or lack of that --

QUESTION: Why do you say Walton was a blip in -- in the history? Are you talking about from the time Arizona reimposed capital punishment after Furman?

MR. MURRAY: Yes, Your Honor, and even before that. For hundreds of years, juries have been having the responsibility to determine the facts that are necessary for individuals to be eligible for the death penalty.

QUESTION: But surely, I mean, Arizona had adopted that system before Walton or Walton wouldn't have had occasion to pass on it.

MR. MURRAY: Arizona never adopted the -- the system wherein the juries would be involved in sentencing. They adopted the system where the jury convicted only of the first degree murder and never performed the eligibility determination, although that's what the statute required.

QUESTION: And -- and it was that system that came to us in Walton, was it not?

MR. MURRAY: It was that system, Your Honor.

QUESTION: So saying that Walton -- when you say

blip, I got the impression you thought it originated something. It didn't. It just passed on the existing system in Arizona.

MR. MURRAY: It passed on the existing system in Arizona but for the wrong reason. But for a misunderstanding of how the system in Arizona worked, this Court -- had this Court been presented with, for example, the information the Arizona Supreme Court gave in Ring I when they explained that in the Arizona system the aggravating circumstances do serve the eligibility purpose that they are an essential statutory factual element, then had you had that before Walton, had you had that information, Walton would have resulted in a different opinion is our position because you would have known then what you acknowledged in Ring, that we're not talking about jury sentencing in capital cases. We're talking about making determination of eligibility for the death penalty itself with these aggravating circumstances.

And I would point out this is heinous, cruel, and depraved aggravating circumstance. It isn't one -- and this goes back a little bit to accuracy, but it isn't one that everybody necessarily agrees on because the prosecutor himself, the initial prosecutor in this case, did not, as the court in the Ninth Circuit points out, believe that there was enough evidence to support the

heinous, cruel, and depraved circumstance -- aggravating circumstance. But that --

QUESTION: Why -- why should that be a factor that we take into consideration? I mean, surely there could be a difference between prosecutors and the fact that somebody in the DA's office thought there wasn't evidence -- enough evidence to go ahead, shouldn't be crucial in deciding whether the finding was correct made by the court or by the jury.

MR. MURRAY: It just, Your Honor, goes to the fact that if two people on the government's side of the case are disagreeing on it, then it just shows the absolute need and the -- the essential character of the jury's role in determining the community's sense of whether such an aggravating factor did exist in this case.

Now, if I can just continue on the old versus the new then, what happened then was that given the understanding of the -- how the Arizona court worked, this Court went back to -- to the basics of determining that every element of an offense, in this case capital murder, must be proved beyond a reasonable doubt and the State is not able to rely upon mere labels or, you know, drafting of the sentence -- of the statutes to give a different determination to what those aggravating circumstances are.

And so this is really back consistent with

Mullaney and -- and Patterson and McMillan, although McMillan wasn't out at the time Mr. Summerlin's case became final. That was 2 years later. But that series of cases.

When we say it's -- it's old, it's as if Walton was a -- in essence, a new rule and Ring was a new rule that corrected Walton. And so we're back for Mr. Summerlin where he's raised this issue for 20 years since 1983, over 20 years, and -- and has sought to have the jury verdict on the capital offense to make -- and their determination of whether he was eligible for the death penalty. And he has not been given that.

QUESTION: Do you agree, by the way, with Mr. Wood that the judge -- whatever his name was -- that he didn't use the presentence report because that would be considered hearsay under Arizona law?

MR. MURRAY: I do, Your Honor. There was a significant amount of inadmissible or irrelevant evidence that went to the judge, Judge Marquardt, who was a judge that had his own problems in this case, but that went to him that would not have been reviewed or heard by the jury.

In addition, the --

QUESTION: But Mr. Wood said he couldn't consider it because it was hearsay. Is it --

MR. MURRAY: Well --

QUESTION: But the judge -- no more than the jury, the judge could not have considered that in determining whether there was an aggravating factor.

MR. MURRAY: I understand, and I agree that there are rules that -- and there are rules and presumptions that say that the court is not going to consider irrelevant or inadmissable evidence. The problem we have is that evidence is there. The judges are human. They have human frailties as this case shows, and in the long run, that is precisely why the Framers of the Constitution chose to have the juries to stand as protectant bulwarks between the accused and the government officials who are, you know, seeking to have the death penalty imposed on the individual.

QUESTION: Who don't have human frailties. Right? Juries -- juries without human frailties.

MR. MURRAY: We all -- the juries, the judges, every one of us have human frailties, Justice Scalia.

QUESTION: There -- there were a number of issues that you raised in this case that -- that they didn't get to below. Is that right? Because of the court of appeals' decision on the Ring retroactivity.

MR. MURRAY: Yes, Your Honor. There are all but -- they did rule on the ineffectiveness at the trial phase

itself --

QUESTION: And they rejected the --

MR. MURRAY: -- as a preliminary matter, but the remainder of the rules -- of the ineffectiveness issues and the judge issues remain open. And I -- I would assume that if we did not prevail on this, that we'd be back in the Ninth Circuit for a ruling on that.

If there are no further questions, I believe I've covered the issues, Your Honor.

QUESTION: Thank you, Mr. Murray.

Mr. Todd, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JOHN P. TODD

ON BEHALF OF THE PETITIONER

MR. TODD: If I may, I would like to respond to Justice Breyer's question concerning flexibility of Teague. And I -- I would suggest that if this Court had a rule that so increased accuracy, a new rule, and so was -- changed this Court's understanding of some truly bedrock principle, then this Court would not care how many cases it affected because it was so important, so critical and that you would apply it retroactively.

Conversely, if a rule doesn't reach that, then you don't apply it retroactively under Teague is -- is our understanding. The --

QUESTION: What -- what rules would fit that so

important? And the -- the briefs cite Gideon. Is there anything else?

MR. TODD: I think Gideon is the -- the ideal, perfect example.

QUESTION: Yes, but are there other examples?

MR. TODD: I cannot think of one off the top of my head, Your Honor. These surely are not.

In -- in terms of your concern with whether there's any substance component to the Teague -- excuse me -- to the Ring or Apprendi opinions, it seems to me this Court's opinion in Bousley where you're explaining what truly is a substantive change and you cite to the first Teague exception in the Bousley case, that sort of explains that -- what you're really concerned with, particularly on habeas, is that we don't have somebody who shouldn't be convicted, shouldn't be punished in the system. And so if it falls within like the first Teague exception or if you change the law, your -- your understanding of the law like in Bailey, or the other two cases that are cited in the yellow brief, Fiore v. White and Bunkley v. Florida, where the State court interpreted State law and determined that in their construction of the law, they changed the scope of that statute --

QUESTION: Thank you, Mr. Todd.

MR. TODD: You're welcome.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)